

Summary: The Government moved for a Rule 44(c) inquiry into joint representation, contending that defense counsel's dual representation of the co-defendants created a significant risk of a conflict of interest. Subsequently, the corporate co-defendant retained separate counsel, transforming the issue from one involving dual representation to one involving successive representation. The Court found that the defendants were fully apprised of the potential for a conflict of interest and their right to effective assistance of counsel; the defendants and their counsel had the opportunity to identify and address potential conflicts of interest; and the defendants expressed the desire to be represented by their attorneys of choice. The Court found that the defendants voluntarily, intelligently, and knowingly waived their Sixth Amendment right to the effective assistance of conflict-free counsel.

Case Name: USA v. Micheal L. Fisher, Arniel Schaff, Fisher Sand and Gravel Co., Inc.

Case Number: 1-08-cr-26

Docket Number: 49

Date Filed: 7/9/08

Nature of Suit:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

United States of America,)	
)	
Plaintiff,)	
)	ORDER ON RULE 44(c) INQUIRY
vs.)	
)	
Micheal L. Fisher, Amiel Schaff, and)	
Fisher Sand and Gravel Co., Inc.,)	
)	Case No. 1:08-cr-26
Defendants.)	

Before the Court is the "Government's Motion for Rule 44(c) Inquiry Regarding Joint Representation" filed on May 30, 2008. See Docket No. 20. The Government initially requested that the Court conduct an inquiry of defendants Micheal L. Fisher and Fisher Sand and Gravel Co., Inc., pursuant to Rule 44(c)(2) of the Federal Rules of Criminal Procedure with respect to the joint representation of those defendants by defense counsel Jon Jensen. The Government contends Jensen's dual representation of the co-defendants in this criminal conspiracy case would create a significant risk

of an actual conflict of interest arising during these proceedings.

On June 6, 2008, the Court issued an “Order Granting Government’s Motion for Rule 44(c) Inquiry Regarding Joint Representation” and a hearing was scheduled for July 8, 2008, in Bismarck, North Dakota.

On July 2, 2008, a response was filed on behalf of Fisher Sand and Gravel Co., Inc. See Docket No. 44. It was noted that the corporation had retained separate defense counsel (Thomas Dickson) to defend the corporation’s interests at trial. The retention by defendant Fisher Sand and Gravel Co., Inc., of separate counsel subsequent to the filing of the Government’s motion for a Rule 44(c) inquiry transformed this case from one involving “dual” representation to one involving “successive” representation.

A hearing was held on July 8, 2008. Present at the Rule 44(c) inquiry were Christopher Strauss and Michael Watling, counsel for the United States Department of Justice; Jon Jensen, counsel for Micheal L. Fisher and Micheal Fisher; and Thomas Dickson, counsel for Fisher Sand and Gravel Co., Inc., and Timothy Priebe, general counsel and secretary for Fisher Sand and Gravel Co., Inc.

I. LEGAL ANALYSIS

A defendant’s Sixth Amendment right to the effective assistance of counsel includes the correlative right to representation free from any conflicts of interest. Wood v. Georgia, 450 U.S. 261, 271 (1981); United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982). When informed that a risk of a conflict of interest exists, the district court must hold a pretrial hearing to inquire into the situation. See Holloway v. Arkansas, 435 U.S. 475, 484 (1978); United States v. Lashley, 251 F.3d 706, 711 (8th Cir. 2001). A defendant may validly waive the right to the assistance of conflict-free counsel so long

as the waiver is knowing, voluntary, and intelligent. Agosto, 675 F.2d at 969-70; United States v. Brekke, 152 F.3d 1042, 1045 (8th Cir. 1998). In the pretrial context, a court must be allowed substantial latitude in refusing waivers of conflicts of interest not only where an actual conflict exists, “but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” Wheat v. United States, 486 U.S. 153, 163 (1988); United States v. Francis, 367 F.3d 805, 831 (8th Cir. 2004) vacated on other grounds by Davis v. United States, 543 U.S. 1108 (2005); Agosto, 675 F.2d at 970 (noting that the difficulty of analyzing potential conflicts of interest prior to trial requires a flexible standard).

The Eighth Circuit applies Rule 44(c) to cases involving successive representation, that is, cases like the present case where an attorney representing a defendant has previously represented the other defendant. Agosto, 675 F.2d at 970. Although the Eighth Circuit declined to decide whether Rule 44(c) imposed an affirmative duty on a district court to conduct an inquiry in all cases of successive representation, the Court directed that the last sentence of Rule 44(c)(2) “establishes a suitable framework for the district court’s exercise of responsibility in assessing possible conflicts [. . .].” Id.; see id. at n.3. The pertinent portion of Rule 44(c)(2) provides, “[u]nless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant’s right to counsel.”

The Eighth Circuit has identified two major sources of potential conflict in successive representation cases:

In the successive representation situation, privileged information obtained from the former client might be relevant to cross-examination, thus affecting advocacy in one of two ways:

(a) the attorney may be tempted to use that confidential information to impeach the former client; or

(b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information.

...

The second major possibility of conflict in the successive representation situation is that the attorney's pecuniary interest in possible future business may cause him to make trial decisions with a view toward avoiding prejudice to the client he formerly represented.

Agosto, 675 F.2d at 971 (internal citations omitted).

At the hearing conducted on July 8, 2008, counsel for the Government outlined the risks that potentially exist arising from defense counsel's receipt of privileged information from Fisher Sand and Gravel Co., Inc., and its employees, and the impact that could have on counsel's loyalties to the defendants. Due to the inherent risks of an actual conflict developing at trial created by counsel's successive representation of co-defendants, and in accordance with Rule 44(c) of the Federal Rules of Criminal Procedure, the Court afforded counsel and their respective clients the opportunity to identify and discuss all factors that may potentially create a conflict of interest situation in the future. The Court also personally advised defendant Micheal L. Fisher, and Timothy Priebe, general counsel and secretary for Fisher Sand and Gravel Co., Inc., of their constitutional right to the effective assistance of counsel under the Sixth Amendment and their right to be represented by an attorney free from any potential or actual conflict of interest.

II. CONCLUSION

After a thorough review and consideration of the entire record, the relevant case law on inquiries to be conducted under Rule 44(c) of the Federal Rules of Criminal Procedure, and the arguments of counsel, the Court expressly finds that (1) defendants Micheal L. Fisher and Fisher Sand and Gravel Co., Inc., have been fully apprised of the factors that may create the potential for a conflict

of interest on the part of their defense counsel; (2) each of the above-named defendants has been fully apprised of their right to the effective assistance of counsel under the Sixth Amendment which includes the right to be represented by an attorney who is free of any conflicts of interest; (3) each of the defendants and their respective counsel have had an opportunity to identify, discuss, and address the potential conflicts of interest which may arise in this case; and (4) each of the defendants have voiced a strong desire to be represented by the attorney of their choice, namely, Jon Jensen, retained on behalf of Micheal L. Fisher, and Thomas Dickson, retained on behalf of Fisher Sand and Gravel Co., Inc. Further, the Court expressly finds that each of the above-named defendants, after having been fully apprised of the risks associated with a potential conflict of interest arising in this case, have voluntarily, intelligently, and knowingly waived their Sixth Amendment right to the effective assistance of conflict-free counsel.

IT IS SO ORDERED.

Dated this 9th day of July, 2008.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge
United States District Court